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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 23.

NEROY CARTER,
Appellant,

v.

ATLANTA & SAINT ANDREWS BAY RAILWAY COMPANY,
Appellee.

BRIEF

On Behalf of Appellee Atlanta & Saint Andrews Bay Railway Company.

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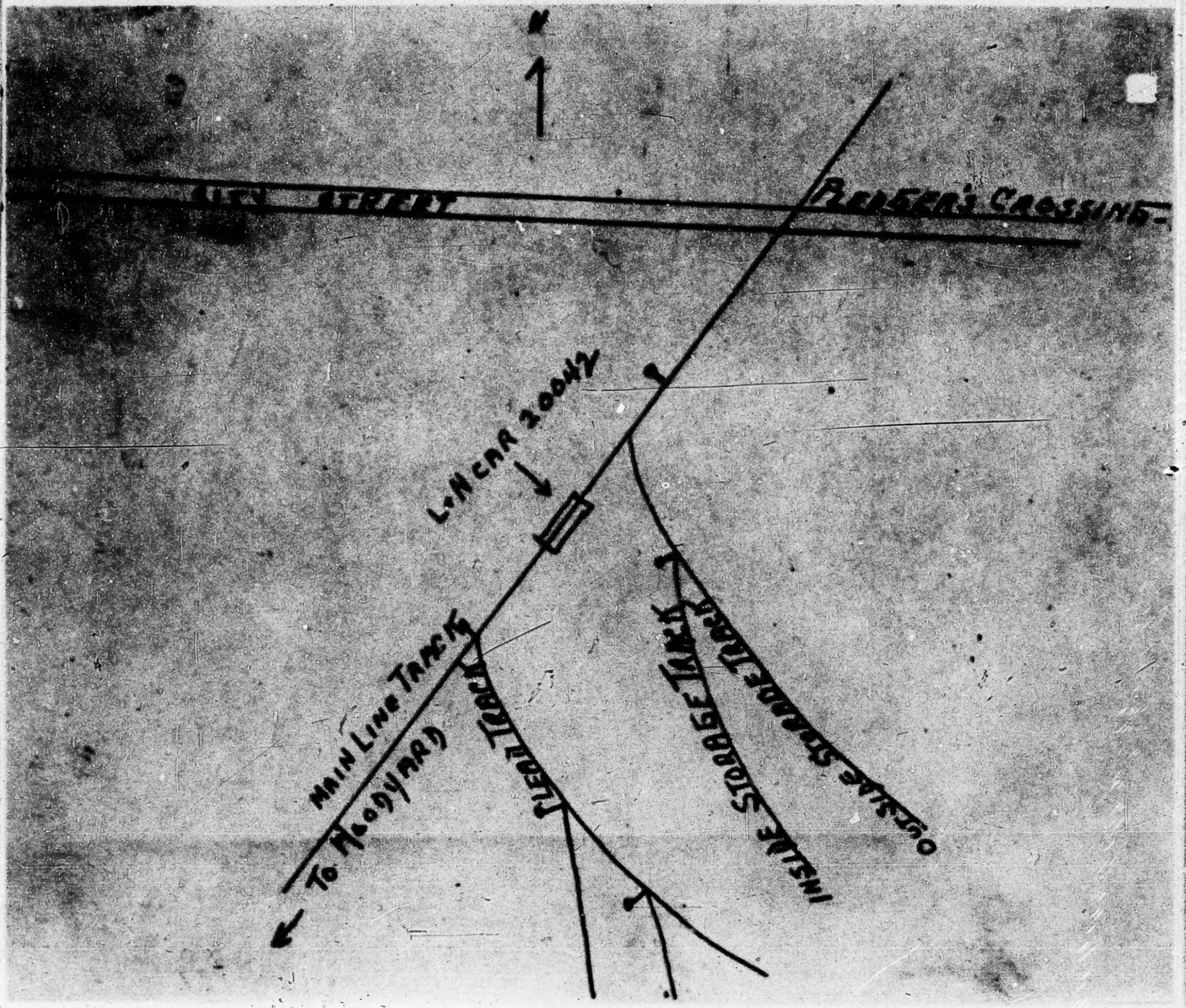
PRELIMINARY STATEMENT.

This Brief on behalf of Appellee is prepared without having received the Brief from Appellant within the time required by the Rules of this Court. Leave is expressly requested to file a supplemental brief after Appellant's Brief has been received.

STATEMENT OF FACTS.

The suit was brought under the Federal Employers' Liability Act. The plaintiff employee was a brakeman employed by defendant and his alleged injuries were suffered during a switching operation at night. We use the term "alleged" injuries advisedly. There was some evidence in the record from which the jury may have found that the plaintiff had no injury at all, but a congenital deformity (R. 104, 107-110). The complaint as originally filed alleged only general negligence, viz., excessive speed (R. 2), but was later amended to allege a violation of the Safety Appliance Act in the form of a defective coupling. At the conclusion of the evidence the trial court instructed the jury that a recovery could not be based on a violation of the Safety Appliance Act for the reason that the injury did not occur at the time the coupling failed. The court then submitted the case to the jury as to general negligence only and the jury returned a verdict for the defendant Railroad. Judgment was entered and later affirmed in the Circuit Court (170 F. 2d 719).

The sequence of switching operations preceding the alleged injury was as follows: Plaintiff was the lead or "'swing" brakeman, and during the time in question was in charge of the train (R. 79-80). The railroad yards included a main line track with multiple sidings. The diagram below, while not drawn to scale, will show the general scene:


N
Elm Street
Peoples Crossing
L-N car 3004
Main Line Tracks
To Hoogland
Fuel Track
Inside Storage Track
Outside Storage Track

At the start of the operation the engine, headed south, was on the main line track between Pledger's Crossing and the storage tracks. It proceeded forward into the inside storage track and picked up a box car. After this, it backed out of the inside storage track until clear of the switch, then proceeded forward into the outside storage track, where it picked up eight wood-rack cars loaded with pulpwood. Finally, it was to back out of the storage track, pulling all nine cars onto the main line, and there proceed south, pushing the cars until a connection was made with L&N Car 20042, shown on diagram, after which the entire cut of ten cars was to be pushed into the wood yard and there placed at various points.

These operations proceeded according to schedule until a coupling was attempted with L&N Car 20042. The plaintiff himself had, prior to the described switching movement, made the preparation for this coupling by "bleeding the air" and setting the brakes on L&N Car 20042 and opening the lips of its coupler. There is evidence in the record that this was done improperly in that plaintiff opened both lips of the coupling (R. 81), whereas good railroad practice required the opening of only one (R. 125). As the engine proceeded south, pushing one box car and eight wood-rack cars ahead of it, plaintiff stood [illegible]n the darkness directing the coupling operation. The p[illegible]intiff gave the engineer a "come ahead" signal to make the coupling to L&N Car 20042, and the cars came in contact but the coupling failed (R. 72, 73). This fact, however, was not known to the engineer and fireman (R. 90, 118). The plaintiff gave no signal that the coupling had failed, and in fact, after it failed and while the train was stopped, gave still another signal to "come ahead" and this was acknowledged by the engineer (R. 82, 93), though in this case plaintiff says he was signalling for the footboard man to come with his lantern (R.

93, 82, 84). In the meantime L&N Car 20042 had commenced to roll and plaintiff started after it on foot. He overtook the car and mounted its bulkhead and tightened its hand brake, bringing it to a halt. Up to this time plaintiff had not been injured. After he had brought the car to a halt and while he was still sitting on its bulkhead, he says he looked up and saw the engine and cut of cars "bearing down on him out of the night". It was in connection with this movement that plaintiff alleged excessive speed on the part of the engineer. The cut of moving cars contacted the stationary L&N Car 20042 a second time, and this time the coupling worked perfectly (R. 85). At the time of this second coupling, however, plaintiff says that he braced himself for the impact but was unable to maintain his balance and fell to the floor of the car, where the alleged injury occurred.

ARGUMENT.

I. The Allegations of General Negligence.

The only allegation of general negligence contained in the complaint is a charge that the engineer, at the time of the second coupling, was moving the train at an excessive rate of speed. The evidence on this issue was in dispute. The question was submitted to a jury who have resolved it in favor of the Railroad. There is ample evidence to support this verdict. This Court does not ordinarily concern itself with questions regarding the weight of the evidence and any exception based on the allegation of general negligence is clearly without merit.

II. The Issue as to the Safety Appliance Act.

The first issue presented with respect to the Safety Appliance Act is the question whether the coupling in question was defective. The burden of proving this issue, of course, rests with the plaintiff, and since this is the fact upon which the application of the Act depends, the proof on this question should be clear and unequivocal.

In the case of **Myers v. Reading Co., 311 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615**, this Court held that an appliance may be shown to be defective in either of two ways, (1) by "evidence . . . to establish some particular defect," or (2) "by showing a failure to function when properly operated with due care in the normal, natural and usual manner" (citing **Didinger v. Pennsylvania R. R. Co., 39 F. 2d 798-799**).

In the present case, the first of these methods of proof was not even attempted. The plaintiff not only failed to

prove any specific defect but the company, in rebuttal, affirmatively proved that the coupling was subsequently inspected and no defect found (R. 112-116). Plaintiff himself admitted "It had been coupling" (R. 82).

Nor did plaintiff sustain the bu.den of proof as required by the second method. It is true that he proved the coupling failed on one occasion. In fact, he at first contended that it failed several times, but on cross-examination he later took this back (R. 76). But mere proof that the coupling failed to work on one occasion is not all that **Myers v. Reading Co.** requires. The requirement is that plaintiff show that it failed **when properly operated with due care in the normal, natural and usual manner.** The Court will recall, of course, that plaintiff himself had prepared this coupling before its failure, and that other evidence tended to show it failed to work not because of a defect, but because he set it wrong. Plaintiff admitted, for example, that he opened both lips of the coupling, when the record clearly shows that better railroad practice requires the opening of only one, since if two are opened two pins must fall instead of one (R. 112-116). When questioned about this, plaintiff's answers were equivocal. On page 81 of the record, after admitting that he had opened both knuckles, plaintiff was asked:

"Q. Don't you know, as a matter of fact, a coupling can be made much better with just one open?

A. Well, I don't know.

Q. I ask you, as a matter of common knowledge, don't you know a coupling will be made better if one is open and set on that coupling?

A. That is not a fact of common knowledge. Two opened.

Q. Open both of them?

A. Yes, sir."

In another place (R. 77) plaintiff was asked whether in setting the car, bleeding the air and setting the brakes he had done everything he should have done, to which he responded "Yes." It is apparent, however, from reading the context that at this point plaintiff was testifying, not that he had done everything properly, but merely that each of these items was included in what he had done. This, of course, is quite different from testimony that each had been done properly. From this testimony it is apparent that plaintiff was uncertain whether to admit he set the coupling improperly or whether to deny it unequivocally. First, he said he did not know what was the better practice. Thereafter, all he testified was that, if better operating practice required the opening of only one knuckle, this was not a fact of common knowledge (R. 125). Now let us turn to the other evidence on this subject. Mr. Nichols, the defendant's General Superintendent, testified as follows:

"Q. Are you familiar with the manner of coupling a car of the type involved in this series, such as car 20042, involved in this case?

A. I am.

Q. I will ask you if, in common railroad practice and procedure, a man attempting to make a coupling is it best to open one knuckle or both knuckles?

A. One.

(Objection.)

The Court: You are familiar with the mechanism of these automatic couplers?

Witness: Yes, sir.

The Court: And you testify, as I understand it, they are more likely to make, with one open, than two?

Witness: Yes, sir.

The Court: Two would diminish the likelihood of making a proper coupling?

Witness: Yes, sir. Two pins would have to fall instead of one."

Nowhere was this testimonly contradicted or rebutted, and in the light of it we respectfully submit that the plaintiff failed to carry the burden of proving the coupling was defective. We think the cases so hold.

It is interesting, for example, that in **Myers v. Reading Co.**, supra, holding that an appliance can be proved defective by showing it failed to work, the court cited the case of **Didinger v. Pennsylvania R. R. Co., 39 F. 2d 798-799.** That case presents quite an interesting and different record. In the district court the case went off on a directed verdict based on the plaintiff's opening statement, but this was reversed in the Circuit Court of Appeals. There the plaintiff offered to prove "that the brake was set 'in accordance with the proper and usual manner of setting the brake and it gave away and did not hold.'" The court also referred to "the frequently repeated assertion that the brake had been properly set" and then said:

> "**Assuming the proper setting of the brake,** the fact that it did not hold demonstrates its inefficiency . . . the principle of res ipsa loquitur applies. The failure to hold under normal operation speaks for itself." (Emphasis ours.)

Furthermore, in this case the court anticipated that a defendant might rebut evidence that an appliance was defective by showing it was set wrong. In reversing the lower court and holding that the plaintiff's opening statement made out a case for the jury, the court said:

> "It is possible that, upon hearing, the defendant might have met the showing of inefficiency by evidence that the brake equipment was in good order,

> or by other evidence tending to show that the accident happened through the manner of handling. This, however, does not appear from the opening statement, upon which we are of the opinion the court should not have directed a verdict."

In the present case that very thing happened. The case went to trial and the defendant did in fact rebut the showing of inefficiency by evidence tending to show that its failure to work resulted not from a defect but from the way it was set by plaintiff.

It is also interesting to note that the **Didinger** case in turn cites the case of **Burnett v. Pennsylvania R. R., 33 F. 2d 579.** In this case the plaintiff alleged a defective hand brake the only evidence of which was that it failed to work. Other evidence tended to show that the failure might have been due to the fact that plaintiff himself had wound the brake too tight. In directing a verdict for defendant under these circumstances, the Court said (at p. 580):

> "Even if it might be thought that plaintiff's proofs were consistent with the existence of a brake defect as the cause of this accident, they were at least equally consistent with the existence of some other effective cause. In such case there is no question for the jury."

For these reasons we respectfully submit that the plaintiff failed to carry the burden of proving the appliance defective.

The second question presented with respect to the Safety Appliance Act is whether, assuming the appliance was defective, such defect was the proximate cause of plaintiff's injuries. The Court will recall, of course, that the coupling did not fail at the time of plaintiff's fall; the

complaint is that it failed on a previous occasion. The Court will also recall that after this previous failure and before the injury both the runaway car and the train had come to a stop, and that it was plaintiff himself who had again signalled the train ahead (R. 75, 82, 84, 93). Based on these facts and in the light of several earlier decisions of this Court and the Circuit Courts of Appeal[1] we were prepared to argue here, and did argue in the court below, that even if the coupler was proved defective, still it did not proximately cause the plaintiff's injuries but only created a "condition upon which plaintiff's negligence operated." In short, to paraphrase Mr. Justice Black, we were prepared to distinguish "cause in the philosophic sense" from "proximate cause" in the legal sense. In **Coray v. Southern Pacific Co.**,[2] however, decided at the last term, this Court suggested that such an argument was a mere "dialectical subtlety" which could serve no useful interpretive purpose.

Now at the outset let us say that we have no quarrel with the result reached in **Coray v. Southern Pacific Co.** and that we agree that it was properly decided on its facts. We do feel, however, that in spite of some of its language it was never intended by the Court to apply to such a situation as is here presented. At one fell swoop the language of the **Coray** decision would seem to abolish all distinctions between proximate causes and those remote causes which have heretofore been called only conditions, and to fix an inviolable rule that if a defective appliance "contributes" in whole or in part, directly or indirectly, to an employee's injury, "the railroad must pay damages." Frankly, if this language is to be literally

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1 Cf. St. Louis R. R. Co. v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. Ed. 1290; Lang v. N. Y. Central R. R., 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729; Reetz v. Chicago etc. R. R., 46 F. 2d 50.

2 ... U. S. ..., 69 S. Ct. 275, ... L. Ed. ...

applied, **Coray v. Southern Pacific** has made some new law. It has not only abolished the distinction between causes and conditions, but has destroyed the whole requirement of proximate cause as well. In such case, all that is necessary for a recovery is to show that the failure of an appliance, occurring sometime in the past, has "contributed" to a situation in which some injury has occurred. If this is the law it is entirely new, for not even the compensation acts have gone this far. Suppose, for example, that an employee's job has kept him overtime and made him catch a late train which happens to be wrecked, causing him to be injured. An Industrial Board would clearly hold that such an injury was not compensable because it did not arise out of and in the course of the employment. And yet, in a very real sense, the employment has "contributed" to the injury, at least in part, since it caused the employee to be where he was and without it the injury could never have occurred. In short, the employment has created the "condition" in which the injury was to happen. Or, suppose an employee's work carries him to a certain location where he is struck by lightning. Here again the same distinction would prevent recovery; the work did not "cause" the injury—it merely made it possible. By the clearest principles neither of these cases would be compensable. **And yet, under the language used in Coray v. Southern Pacific, if carried to its logical conclusion, each would be actionable if a defective appliance "contributed" to the injury by causing the employee to be where he was.** Frankly we cannot believe the Court intended to go so far.

The question, therefore, in the light of **Coray v. Southern Pacific,** is not so much whether the Court will continue to distinguish between proximate and remote causes —of this we feel confident—but, rather, where the Court will now draw the line. Furthermore, we think the present

case presents an admirable opportunity for the Court to make the new line of demarcation clear. We think the basis of distinction should be that when, following the failure of an appliance, matters have been brought safely to rest without injury, the evil propensities of that particular failure are legally at an end. If this distinction is made the correctness of the present decision is clear. In this case an appliance failed, not at the time of the injury, but before. After it failed all of the factors present, both the train and the runaway car, were safely brought to rest. Following this, and apparently because of plaintiff's own signal, the train moved forward again and the cars collided a second time, causing the injury. We submit that in such a case the sole cause of the injury was the subsequent movement of the train, and as this was brought about not by a defective coupling, but by plaintiff's second signal to "come ahead", we say the Safety Appliance Act had nothing to do with it.

Manifestly there is a distinction between these facts and those in the **Coray** case. Suppose, for example, in the **Coray** case, that after the defective appliance had stopped the train the velocipede had been brought to a stop also, so that matters had come to rest in apparent safety, and that thereafter plaintiff had again started his velocipede and crashed into the standing cars. In such event the defective appliance would still have "contributed" to the injury, since it caused the train to be where it was. We doubt, however, that the decision of the Court would have been the same had these facts been presented. We think this case presents that distinction.

Nor does this distinction do violence to the rule that contributory negligence is no defense. True, this Court could very well find under the facts of this case that the plaintiff's negligence in signalling the train to "come

ahead" after the appliance failed was not merely contributory, but was in fact the sole proximate cause of his injuries. But the movement of the train, as an effective intervening cause, does not depend on whether plaintiff was negligent at all. The intervention of the moving train was a fact which came on the scene for an independent reason and after the appliance failed, and it was no less an intervening factor whether its movement was caused by negligence or otherwise. In fact, its intervening character would be the same, so far as concerns the Safety Appliance Act, even if the movement of the train was brought about by the negligence of the railroad. In this event, while plaintiff could recover, his recovery would be under the Federal Employers' Liability Act alone, not under the Safety Appliance Act. This theory, of course, was submitted to the jury and has been found in favor of the defendant.

For the above reasons we respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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I, James N. Frazer, of counsel for the appellee in this case, do hereby certify that I have mailed copies of the above and foregoing brief to Hon. J. Kirkman Jackson and Hon. Erle Pettus, 818 Massey Building, Birmingham 3, Alabama, on this ... day of October, 1949, both attorneys of record for the appellant.

James N. Frazer.